Supreme Court, U.S.
FILED
061361 MAR 12 2007
OFFICE OF THE CLERK

NO. ~~97-6108~~ 06-4749

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

MARCEL SFARCIOC

Petitioner,

v.

SIXTH CIRCUIT COURT of APPEALS

Respondent.

PETITION FOR WRIT OF CERTIORARI

BY: LegalQuest Network, P.C.
Roger R. Rathi
Daniel P. Marcus
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Southfield, Michigan 48075
Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the refusal to hear Petitioner's Appeal, due to a late filing caused by a four day delay in delivery of Overnight Express Mail by the U. S. Postal Service, violates the Due Process Clause of the U.S. Const. amend. V.

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1) **Petitioner's appeal should be reinstated because the late filing was caused solely by the U.S. Postal Service, and this should be considered "excusable neglect."**

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REFERENCE TO OPINIONS BELOW

The November 6, 2006, order of the United States Court of Appeals for the Sixth Circuit, **Sfarcioc v Gonzales**, No. 06-4149.

The December 12, 2006, order of the United States Court of Appeals for the Sixth Circuit, **Sfarcioc v Gonzales**, denying Petitioner's motion for rehearing of that opinion.

STATEMENT OF JURISDICTION

Petitioner seeks review of the November 6, 2006, order of the United States Court of Appeals for the Sixth Circuit, **Sfarcioc v Gonzales**, No. 06-4149. On December 12, 2006, the Sixth Circuit Court of Appeals issued an order denying Petitioner's motion for rehearing of that opinion

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

1. The sole issue in this case concerns the dismissal of Petitioner's "Petition for Review" as being untimely. Petitioner, 31 years old and a Legal Permanent Resident for over 20 years was ordered deported.

2. The Board of Immigration Appeals (BIA) affirmed the Immigration Judge's decision on July 26, 2006. Therefore, the last day the Court of Appeals could accept his Petition for Review was August 25, 2006 (30 days from the BIA decision).

3. Counsel for the Petitioner mailed the Petition for Review on August 23, 2006 by United States Post Office (USPO) via EXPRESS MAIL with the expectation and promise that the package shall arrive at this Court in **Cincinnati, OHIO, Zip 45202** on August 24, 2006 (next day delivery). **See Exhibit 1 – Shipper.** The package was properly addressed to:

   Clerk of the Court
   US Court of Appeals – 6th Circuit
   100 E 5th Street, Room 324
   Cincinnati, OH 45202

4. The United States Postal Service delivered the package to the wrong add (Latonia, Kentucky) and it did not arrive timely at the Court of Appeals. **See Exhibit 2 – Tracking Results.**

5. The Court of Appeals issued a show cause order September 29, 2006 and a Statement and Affidavit were provided outlining the negligence by the United States Postal Service. **See Exhibit 3.**

6. The Court of Appeals, in an order dated November 6, 2006, dismissed the petition, stating, "time limits are strictly enforced." **See Exhibit 4.** A Motion for Reconsideration was denied and this Petition for Certiorari follows. **See Exhibit 5.**

ARGUMENT

Petitioner will face irreparable harm if his appeal from the Bureau of Immigration Appeals (BIA) is dismissed. Through no fault of petitioner, or his counsel, was his appeal untimely. In this day and age businesses have come to rely on the United States Postal Service guarantees of Next Day Deliveries. The legal system would not function without these guarantees. 30 day filing limits, as in this case, would be cut by 20% or more to insure timeliness. Circuit Courts have recognized this problem, at least in so far as the BIA time limits are concerned

In *Anssari-Gharachedaghy v. INS, 210 F.3d 512, 514* (6th Circuit 2000, Hon. Judges Norris, Daughtrey & Wiseman), this court acknowledged that an untimely filing should be excused if extraordinary or unique circumstances interfered:

> "It is true that some courts, including the Sixth Circuit, have recognized that the Board may have jurisdiction to hear an otherwise untimely appeal if a party has been "misled by the words or conduct of the court," Vlaicu v. INS, 998 F.2d at 760 (9th Cir 1993), or if other "extraordinary or unique circumstances" interfered with timely filing. Czyz v. INS, No. 98-2796, 1999 WL 11503 (7th Cir, Jan 4, 1999) at *1; see Sinistaj v. INS, No. 94-3878, 1995 WL 234619 (6th Cir, Apr 19, 1995) at *1; Hussein v. INS, No. 94-3921, 1994 WL 105885

(6th Cir, Mar 28, 1994) [**8] at *1."... See Talamantes-Penalver v. INS, 51 F.3d 133, 136 (8th Cir. 1995), in which the court said:

> The potential delays of regular mail service are commonly known. ***Talamantes-Penalver*** could have filed her notice of appeal by using **United States Postal Service Express Mail** or any number of commercial services that guarantee overnight delivery.... **Talamantes-Panalver** assumed the risk of regular mail delivery; the method by which a notice of appeal is sent is entirely within the control of the appellant."(emphasis added)

The above rulings clearly suggest that if the petition is filed using the United States Postal Service (USPS) Express Mail and counsel reasonably relied on its proper delivery and USPS mis-handled the delivery, it is an extraordinary or unique interference. This ruling is also supported by decision in other circuits.

In Zhong Guang Sun v. US Dept of Justice, 421 F.3d 105, (2nd Cir, 2005), the court deliberated on the exact issue and held that, "Airborne Express's failure to deliver the petitioner's notice of appeal overnight, as promised, constituted "extraordinary or unique circumstances" such that the petitioner's appeal should have been heard, despite the untimeliness of the filing." supra at 111.

The Zhong Guang Sun Court analyzed decisions in various circuits regarding the issue. It supported the view that a time deadline is jurisdictional, however, it is subject to exceptions in "rare circumstances" and that a petitioner's use of Airborne Express "would appear to qualify [the petitioner] for relief from late filing as a unique or rare circumstance, quoting Oh v. Gonzalez, 406 F.3d 611 (9th Cir, May 2, 2005). The Court clearly recognized the exception, citing Anssari-Gharachedaghy v. INS, supra and Talamantes-Penalver v. INS, supra, for the proposition that:

> "The clear implication of both Anssari-Gharachedaghy and Talamantes-Penalver is that a delay in delivery by an express delivery-service, in contrast to a delay in regular mail, could constitute extraordinary circumstances." 421 F.3d 110.

And they further noted:

> "We find the common-sense observation by the Ninth Circuit and the implicit assumption of both the Sixth and Eighth Circuits - as buttressed by the observations of the Seventh Circuit in a different context and the instruction of the BIA itself- that the way in which a petitioner may insure timely filing is to use an overnight service such as Airborne Express to be telling." 421 F.3d 111.

While these cases are rulings regarding the BIA, Petitioner sees no reason for the Sixth Circuit Court to differentiate when their policy is questioned. It should also be noted that, unlike some other Circuits and many District and State courts, electronic filing is not available.

Under these unique circumstances, Petitioner's Due Process right has been swept away procedurally, through no fault on his part. Petitioner, who is married to a United States citizen and has a native born son, humbly requests that this Honorable Court remand his case to the Sixth Circuit Court of Appeals to be heard on the merits.

CONCLUSION

Therefore, petitioner DAV respectfully requests that this Honorable Court resolve the apparent split of authority between the Circuits, and in the Sixth Circuit's own jurisprudence; and to reaffirm the due process principles set forth in the United States Constitution's 5th Amendment, by granting this petition for a writ of certiorari.

Respectfully submitted,
LEGALQUEST NETWORK, PC

By: _____

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(248) 663-1000
Attorneys for Petitioner

Dated: March 9, 2007

APPENDIX

Exhibit 1 – Shipping Label 15

Exhibit 2 – Tracking Results.....16

Exhibit 3 – Order dated September 26, 2006.....17

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BEST AVAILABLE COPY

Exhibit 1

EQ 840863553 US

EXPRESS MAIL
UNITED STATES POSTAL SERVICE®

Customer Copy
Label 11-B, March 2004

Post Office To Addressee

ORIGIN (POSTAL SERVICE USE ONLY)

PO ZIP Code: 48037	Day of Delivery: ☒ Next ☐ 2nd ☐ 2nd Del. Day	Postage: $ 14.40
Date Accepted: 8-13-06 (Mo. Day Year)	Scheduled Date of Delivery: Month 8 Day 14	Return Receipt Fee: $
Time Accepted: 5:00 ☐ AM ☐ PM	Scheduled Time of Delivery: ☐ Noon ☐ 3 PM	COD Fee: $ / Insurance Fee: $
Flat Rate ☐ or Weight: lbs. ozs.	Military: ☐ 2nd Day ☐ 3rd Day	Total Postage & Fees: $ 14.40
	Int'l Alpha Country Code	Acceptance Emp. Initials:

DELIVERY (POSTAL USE ONLY)

Delivery Attempt Mo. Day	Time ☐ AM ☐ PM	Employee Signature
Delivery Attempt Mo. Day	Time ☐ AM ☐ PM	Employee Signature
Delivery Date Mo. Day	Time ☐ AM ☐ PM	Employee Signature

CUSTOMER USE ONLY

PAYMENT BY ACCOUNT
Express Mail Corporate Acct. No.

Federal Agency Acct. No. or Postal Service Acct. No.

☐ WAIVER OF SIGNATURE (Domestic Mail Only)
Additional merchandise insurance is void if customer requests waiver of signature. I wish delivery to be made without obtaining signature of addressee or addressee's agent (if delivery employee judges that article can be left in secure location) and I authorize that delivery employee's signature constitutes valid proof of delivery.

☐ NO DELIVERY ☐ Weekend ☐ Holiday

Mailer Signature

FROM: (PLEASE PRINT) PHONE (248) 603-1000
Legal Quest Network, P.C.
24955 Southfield Rd.
Suite 210
Southfield, MI 48075

TO: (PLEASE PRINT) PHONE ( )
Clerk of the Court
US Court of Appeals - 6th Circuit
100 E 5th Street, Room 324
Cincinnati, OH 45202

ZIP + 4 (U.S. ADDRESSES ONLY. DO NOT USE FOR FOREIGN POSTAL CODES.)
4 5 2 0 2 + _ _ _ _

FOR INTERNATIONAL DESTINATIONS, WRITE COUNTRY NAME BELOW.

FOR PICKUP OR TRACKING
Visit www.usps.com
Call 1-800-222-1811

EMS

UNITED STATES POSTAL SERVICE.

Home | Help | Sign In

Track & Confirm FAQs

Track & Confirm

Search Results

Label/Receipt Number: EQ84 0863 553U S
Detailed Results:

- Delivered, August 24, 2006, 8:36 am, LATONIA, KY 41015
- Arrival at Pick-Up-Point, August 24, 2006, 8:34 am, LATONIA, KY 41015
- Arrival at Unit, August 24, 2006, 8:28 am, CINCINNATI, OH 45275
- Enroute, August 24, 2006, 7:03 am, CINCINNATI, OH 45275
- Enroute, August 23, 2006, 8:27 pm, DETROIT, MI 48242
- Acceptance, August 23, 2006, 5:00 pm, SOUTHFIELD, MI 48037

Track & Confirm

Enter Label/Receipt Number.

Go >

< Back Return to USPS.com Home >

Notification Options

Track & Confirm by email

Get current event information or updates for your item sent to you or others by email. Go >

Proof of Delivery

Verify who signed for your item by email, fax, or mail. Go >

POSTAL INSPECTORS Preserving the Trust site map contact us government services jobs National & Premier Accounts
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Exhibit 2

Exhibit 3

No. 06-4149

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARCEL SFARCIOC,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
ALBERTO R. GONZALES,	)	FILED
Attorney General,	)	Sept. 29, 2006
	)	
Respondent.	)	

The petitioner seeks review of a decision of the Board of Immigration Appeals ("Board") that denied his request for a cancellation of removal. A review of the limited material before the court suggests that there may be an issue with respect to appellate jurisdiction.

The Board issued its decision on July 26, 2006. A petition to review a final order of the Board must be filed in the appropriate court of appeals "not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1). When computing a period for appeal, the first day of the period is excluded and the last day is included, unless it is a Saturday, Sunday, or a legal holiday. Fed. R. App. P. 26(a); *see also Bartlik v. U.S. Dept. of Labor,* 62 F.3d 163 (6th Cir. 1995) (Rule26(a)

applies to petition for review of an administrative decision). Accordingly, the date the Board issued its decision, July 26, is not included. The last day, August 25, is included. This petition was not received and docketed in this court until August 28, 2006. It therefore appears to be late.

Review of an agency determination is commenced by the *filing* of the petition with the clerk of the court of appeals. *See* Fed. R. App. P. 15(a). Although the petition for review appears to have been prepared on August 22, the placement of the petition in the mails within the 30-day period does not create a timely filing. The time limits contained within the provisions for judicial review are strictly enforced. *Stone v I.N.S.*, 514 U.S. 386, 405 (1995). This court has no authority to extend the time for any petition for review of an administrative decision. Fed. R. App. P. 26(b); *Nakhleh v I.N.S.*, 38 F.3d 829, 831 (6th Cir. 1994).

For these reasons, the petitioner is requested to state in writing, within 21 days of entry of this order, if there are any reasons this petition should not be dismissed as untimely.

ENTERED PURSUANT TO RULE 45
SIXTH CIRCUIT RULES

Leonard Green, Clerk

/s

Exhibit 4

No. 06-4149

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARCEL SFARCIOC,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
ALBERTO R. GONZALES,	)	FILED
Attorney General,	)	Nov. 06, 2006
	)	
Respondent.	)	

Before: GILMAN, ROGERS, and GRIFFIN, Circuit Judges.

The petitioner seeks review of a decision of the Board of Immigration Appeals ("Board") that denied his request for a cancellation of removal. Because the petition for review was filed several days late, the petitioner was given an opportunity to state why it should not be dismissed as untimely. He has responded and asks this court to accept the petition as timely.

The Board issued its decision on July 26, 2006. A petition to review to final order of the Board must be filed in the appropriate court of appeals "not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1). When computing a period for appeal, the first day of the period is

excluded and the last day is included, unless it is a Saturday, Sunday, or a legal holiday. Fed. R. App. P. 26(a); *see also Bartlik v. U.S. Dept. of Labor,* 62 F.3d 163 (6th Cir. 1995) (Rule26(a) applies to petition for review of an administrative decision). Accordingly, the date the Board issued its decision, July 26, is not included. The last day, August 25, is included. This petition was not received and docketed in this court until August 28, 2006.

Counsel for the petitioner explains that on August 23, he took the petition to the United States Postal Service for next day delivery via express mail. This is confirmed by the customer copy of a receipt issued by the Postal Service. The scheduled delivery date on that receipt is August 24 at noon.

The package was misdelivered. The tracking information provided by the Postal Service indicates that the package was delivered on August 24, 2006, to an address in Latonia, Kentucky. The Postal Service also provided a copy of the recipient's signature. No explanation is offered of how the petition made its way to the Court; apparently, the recipient returned it to the Postal Service, which then delivered it the following Monday.

Review of an agency determination is commenced by the *filing* of the petition with the clerk of the court of appeals. *See* Fed. R. App. P. 15(a).). Although the petition for review appears to have been prepared on August 22, the placement of the petition in the mails within the 30-day period does not create a timely filing. *See Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989). Further,

the appellate rules expressly provide that the court of appeals may not extend the time of filing a petition for review of an administrative decision. Fed. R. App. P. 26(b); *Nakhleh v I.N.S.*, 38 F.3d 829, 831 (6th Cir. 1994). Thus, a petition filed just a day or two after the statutory time for seeking review is subject to dismissal for lack of jurisdiction. *Danko v. Director, OWCP*, 846 F.2d 366, 369(6th Cir. 1988) (absent specific statutory authority court may not enlarge time for filing a petition for review); *see also, e.g., Malvoisin v. I.N.S.*, 268 F.3d 74 (2d Cir. 2001) (dismissing petition for review filed one day late). Finally, we note the time limits are strictly enforced. *Stone v I.N.S.*, 514 U.S. 386, 405 (1995).

Therefore, this petition for review is DIMISSED as untimely.

ENTERED BY ORDER OF THE COURT

/s

Clerk

Exhibit 5

No. 06-4149

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

MARCEL SFARCIOC

Petitioner

v.

ALBERTO R. GONZALES, Attorney General

Respondent

FILED
Dec. 12, 2006

BEFORE: GILMAN, ROGERS, and GRIFFIN, Circuit Judges.

Upon consideration of the petition for rehearing filed by the petitioner,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s_____
Leonard Green, Clerk